IN THE

United States

Circuit Court of Appeals

For The Ninth Circuit

JOE DUKICH,
Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 4149

Brief of Defendant in Error

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Brief of Defendant in Error

The facts involved in this case have been stated with sufficient accuracy in the brief of plaintiff in error for the proper consideration of this case, and we will, therefore, refrain from further burdening the Court with a reiteration thereof.

Believing that it will be conducive to clearness we will follow the assignments of error in the order adopted by counsel in his opening brief on behalf of plaintiff in error.

ARGUMENT

I.

Thus commencing with assignments of error I, II, and III, counsel for plaintiff in error contends that the demurrer interposed to the information in the above action should have been sustained, supporting this position with the citation of the case of United States v. Cleveland, 281 Fed. 249. The words "then and there" seem to be of paramount importance in the consideration of this case, and in discussing the meaning of this expression, the Court says:

> "Must not the indictment then state its time and place."

We contend, after perusal of this decision, that the Court has a misconception of this phrase, and while we concede that the word "then" refers to the time of commission of the offense, the word "there" only involves and has reference to the question of venue and jurisdiction by the District Court of the crime.

The phrase in question has its origin in the common law and it has not yet been decided that the use of these words would enlarge or add force to the sufficiency of the charge as they are made use of merely to establish that the prohibited act occurred within the jurisdiction and venue of the court. Further, if the words were entirely omitted, such omission would not result in a fatal defect as they would necessarily be supplied by implication. In support of the contention of plaintiff in error counsel quotes at length in his brief from the Cleveland case, supra, and we submit that the issue there raised was

fully discussed and disposed of contrary to such contention by the case of Singleton vs. United States, 290 Fed. 130, and we believe that further argument is unnecessary.

Following the citations contained in plaintiff's brief, we find much reliance placed upon the decision in United States vs. Illig, 288 Fed. 939, which involves the construction of Section 32, Title II of the National Prohibition Act. We contend that a false premise is assumed by the court, when it states, p. 932: "It is not to be assumed that this section was intended as a radical departure from the well settled principles governing criminal pleading and procedure."

Section 32, Title II, of the Prohibition Act is as follows:

> "In any affidavit, information or indictment for the violation of this act, separate offenses may be united in separate counts and the defendant may be tried on all at one trial and the penalty for all offenses may be imposed. It shall not be necessary in any affidavit, information or indictment to give the name of the purchaser or to include any defensive negative averments, but it shall be sufficient to state that the act complained of was then and there prohibited and unlawful, but this provision shall not be construed to preclude the trial court from directing the furnishing the defendant a bill of particulars when it deems it proper to do so."

We submit that the province to change a rule of code pleading is within the Congress of the United States and that such right can not be questioned, and it clearly appears from the section above quoted that it was the definite purpose of congress to indicate the necessary

allegations to properly state an offense under that act. We contend that it can not be declared that the limit of the legislative power of Congress has been transcended by the enactment of said section, and that such is the universal interpretation given the statute by the courts. In contradistinction of the holding in the Illig case, the attention of the court is directed to the case of Davis vs. United States, 274 Fed. 928, from the Ninth Circuit. In this case the form of the indictment is also challenged on the grounds that the statute under discussion "contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense can not be accurately and clearly described if the exception is omitted. It must be shown that the accused is not within the exception."

It is the contention of the government that the language of Section 3, defining the offense, is entirely separable from the exception, and that the elements constituting the offense may be clearly stated without reference to the exception; and, therefore, such reference may be omitted with safety, as the exception clearly contains matters of defense. Section 3 of the said National Prohibition Act, reads as follows:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized by this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

In the case of Massey vs. United States 281 Fed. 293, a demurrer was interposed to the information, which was similar to the one in the instant case. The Circuit Court of Appeals there held that under the terms of Section 3 of said Act, the allegations that the possession was unlawful, was a sufficient statement of the charge of unlawful possession, and a negation of the purpose for which the accused might have possessed it was unnecessary.

Counsel for plaintiff in error cites and relies upon the case of United States vs. Boasberg, 283 Fed. 305, to sustain his contention. But we submit that the weight of authority is against the theory of counsel in view of the decisions in the following cases:

Panzech v. United States, 285 Fed. 871;
Fassela vs. United States, 285 Fed. 378;
Rose vs. United States, 274 Fed. 245;
Hensberg vs. United States, 288 Fed. 370;
Cabiale vs. United States, 276 Fed. 769;
Slack vs. State (*Tex.*), 136 S. W. 1073.

Also see 22 Cyc., pages 344, 345 and 346, where the rule relative to exceptions is clearly expressed.

In the case of United States vs. Nelson, 29 Fed. 202, the principles as to negation of exceptions are stated in the following language:

> "When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense and to negative the exception; *but if the exceptions are obtained in separate clauses of the statute, they may be omitted in the indictment and*

> *the defendant must show that his case comes within them to avail himself of their benefit.*" (Italics ours).

Considering this section of the Prohibition Act in connection with the decisions above cited to sustain the sufficiency of the information, is it not conclusive that the words "Any defensive, negative averments" apply to the possession of intoxicating liquor. What purpose would Section 32 serve, and what was the intent of congress in embodying it in this law, if it were not to make plain the elements to constitute an offense under this act, and to prescribe the necessary allegations to fully inform a defendant of the crime with which he is charged. To hold otherwise is to void and nullify the section in question and we can find no logical grounds upon which such a decision could be predicated: for, if the statute in question is to be given universal application and does not apply to a case of possession, then to what particular class of cases is it applicable?

2.

> "The Court erred in refusing to strike testimony relating to possession and sales of liquor by the bartender Martin, Specifications of Error IV and V." (Number in record II and III.)

The second count of the information filed in this case charged the defendant Dukich directly as a principal under Section 332 of the Penal Code, which provides:

> "Whoever directly commits any act constituting an offense defined in any law of the United States or aids, abets, counsels, commands, induces, or prescribes its commission, is a principal."

Counsel for plaintiff in error cites the case of Davey vs. United States, 208 Fed. 237, in support of his contention that the defendant in the instant case was deprived of the right accorded him under the Constitution that he should be informed of the nature or cause of the accusation against him, which right can not be taken from him by statute abolishing the distinction between principals and accessories. The government, on the other hand, urges that the averments in the second count of this information sufficiently state the crime and serve to put the defendant on notice of the offense of which he is accused. We submit that there is a want of merit in the suggestion urged by plaintiff in error that he has been deprived of any right accorded under the Constitution and we do not believe such position can be maintained in good faith by counsel for plaintiff in error.

The distinction between principals and accessories has been abrogated by the enactment of Section 332 of the Penal Code and the charge against Dukich as a principal informs him with sufficient certainty of the commission of the overt act and puts him on notice to meet the accusation. Because the courts have passed upon the issues involved in this specification, argument on the principle involved is unnecessary to point out the erroneous postion taken by counsel and we will, therefore, content ourselves with the citation of the following cases which are in point:

Rosecranz v. U. S., 155 Fed. 38;
Rooney v. U. S., 203 Fed. 928;
Vane v. U. S., 254 Fed. 32;

Hunter v. U. S., 272 Fed. 235;
Wood v. U. S., 204 Fed. 55;
Ferry v. U. S., 292 Fed. 583;
Egan v. U. S., 287 Fed. 958;
Ruthenberg v. U. S., 245 U. S. 480;

Jin Fuey Moy v. U. S., 254 U. S. 189; and a quotation from the case of *Rooney v. U. S.,* 203 Fed. 928, from this circuit, which so ably states the law upon the question under discussion.

> "This Section is partly taken from Sections 5323, and 5327 of the Revised Statutes (U. S. Comp. St. 1901, pp. 3619, 3670), but is enlarged and made of general application. In it there is no distinction made between misdemeanors and felonies, and it is applicable alike to both classes of offenses. The doctrine at common law was that as to misdemeanors all persons who aided and abetted, or who commanded, advised, or encouraged another to commit an offense, were principals, and could be indicted, tried, and convicted as such."

3.

> The Court erred in Instructions as to the possession by the bartender, Martin (Specifications of Error V and VII).
>
> The Court erred in Instructing the Jury that Sales of Intoxicating Liquor by the bartender Martin would justify the conviction of Dukich (Specifications of Error VI and VIII).

Under these heads counsel complains of the following language in the Court's instructions:

> "* * * * * * and in this case I instruct you that if you find from the evidence that upon the occasion in question the bartender referred to by the name

> of Martin was the agent or the employee of the defendent Dukich, and that man, with the knowledge of Mr. Dukich, had in his possession at that place the intoxicating liquor in question, that, in law, would amount to the possession of Mr. Dukich."

We contend that this instruction is a clear and correct enunciation of the law applicable to the question of agency, and the criminal liability of the master for the acts, and we quote from the case of Heitler vs. United States, 280 Fed. 703, in support of the Government's position:

> "Where two or more parties join in an unlawful undertaking or enterprise, *there is no master and no servant,* but each is liable as principal in a criminal action to punishment for violation of the law. It does not matter whose hand gave out the whiskey, or who served it; it was a common undertaking, participated in by Heitler, and a part of which was a violation of the law as charged, and all are guilty."

In the case of Nobile vs. United States, 284 Fed. 255, the instruction there complained of is even broader than the one under discussion in the instant case, and the court said in passing upon the doctrine of liability of the employer:

> "This is a correct exposition of the law and corrected the first statement. While the civil doctrine that a principal is bound by the acts of his agents within the scope of his employment, and authority to do a criminal act will not be presumed, yet if the defendant was the proprietor, stood by, saw the bartender sell intoxicating liquor, sent over liquor from 420 Grand Street to 500 to be sold, the jury was justified in concluding that the acts of Perazzo were done with defendant's authority and under his di-

rection, and for such he is criminally liable. Sec. 332 Criminal Code."

In a very late case, Ferry vs. United States, 292 Fed. 583, a similar state of facts was before the Court on writ of error from a conviction secured in the District Court, and was affirmed by the Circuit Court of Appeals for the Third Circuit.

"If you find from the evidence beyond all reasonable doubt that at the time and on the occasion referred to in the evidence the bartender known as Martin had in his possession intoxicating liquors, that is, liquors suitable for beverage purposes and containing more than one-half of one per centum of alcohol by volume, and that the defendant Dukich knew of the possession of that liquor by his agent or employee, then you should find the defendant guilty of the offense of the possession of intoxicating liquor."

" * * * * In this connection I further instruct you that if you find that at the time and upon the occasion in question the defendant had in his employ as his agent the man referred to as the bartender and called Martin, and that the sale of this liquor was made by Martin, and you further find it was made in the presence of the defendant Dukich, and that he aided, abetted, counselled, commanded, induced or procured the bartender known as Martin so to sell the liquor, that in law would constitute Mr. Dukich a principal in that transaction and he would be equally quilty with the man Martin who actually carried on and conducted the sale."

"If you find from the evidence beyond all reasonable doubt that the bartender known as Martin was the agent or employee of the defendant Dukich, and that he sold or delivered to Regan the intoxicating liquor referred to in the evidence, and that at the

time of such transaction the defendant Dukich was present and aided, abetted, counselled, advised or participated in the transaction, your verdict should be guilty."

With reference to these Specifications, we do not believe that they possess sufficient merit to warrant further trespass upon the time and patience of the Court to enter into a discussion of the same, and we submit that there is no error therein contained and the law is correctly enunciated and applicable to the facts in this case established by the evidence. In support of this contention is the case of Hawkins vs. United States, 293 Fed. 586, to which we refer the Court.

We respectfully urge and submit that the charge in the information was sufficient to acquaint the plaintiff in error with the offense with which he was charged; that no error was committed by the Court in his instructions to the Jury and that the verdict returned by the Jury should be affirmed.

Respectfully submitted,

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